82-1013

No. .....

IN THE

Supreme Court of the United States

October Term, 1982

DOMINIC PHILLIP BROOKLIER and SAMUEL ORLANDO SCIORTINO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Appeal from the United States Court of Appeal for the Ninth Circuit.

PETITION FOR A WRIT OF CERTIORARI.

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Questions Presented.

(1) Whether the United States Court of Appeals for the Ninth Circuit erred in its finding that the Double Jeopardy Clause of the Fifth Amendment had not been violated where petitioners were prosecuted by the Federal Government for conspiracy to commit an extortion in 1974 and, thereafter, successively prosecuted in 1980 by the Federal Government for substantively committing the same extortion?

(2) Was the petitioners' 1975 plea agreement with the government violated under *Santobello v. New York*?

(3) Does the prosecutor's closing argument, which conceded that petitioners were not involved in the Forex extortions, require reversal on the basis of insufficiency of evidence?

(4) Does federal jurisdiction under the Hobbs Act exist where no actual or potential effect on interstate commerce can be shown?

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OPINION REFERENCE.

United States Court of Appeals for the Ninth Circuit. Opinion filed on September 3, 1982 in Case Nos. 81-1045 and 81-1046 (a copy of which is included in the Appendix hereto).

JURISDICTION.

The United States District Court for the Central District of California had jurisdiction in this cause by virtue of Title 18, United States Code, Section 1962(c); Rule 18 of the Federal Rules of Criminal Procedure.

The United States Court of Appeals for the Ninth Circuit had jurisdiction under Title 28, United States Code, Sections 1291 and 1294(1), Rule 37(a) of the Federal Rules of Criminal Procedure.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED.

Fifth Amendment to United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service and time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 18, United States Code, Sections, 1961, 1962, and 1963 (as set out in the Appendix hereto).

STATEMENT OF THE CASE.

A. "Double Jeopardy.

On July 9, 1974, in the Central District of California, the petitioners, DOMINIC PHILLIP BROOKLIER (hereinafter referred to as "BROOKLIER") and SAMUEL ORLANDO SCIORTINO (hereinafter referred to as "SCIORTINO"), were named in a seven count indictment charging them and others with conspiracy to violate the federal racketeering statute (RICO), extortion, fraud, and aiding and abetting. Count One of that indictment, more specifically, charged BROOKLIER and SCIORTINO with conspiracy through a pattern of racketeering activity to engage in the activities of an enterprise which affected interstate commerce to extort and illegally collect money, property, and gambling debts from persons engaged in legitimate and illegitimate enterprises in violation of Title 18, U.S.C. § 1962(d). Among the charged "acts of racketeering" set out in Count One, was the planning and commission of the extortion of a Los

Angeles bookmaker by the name of Sam Farkas. On April 9, 1975, BROOKLIER and SCIORTINO, after substantial negotiations with the government, entered pleas of guilty to Count One of the indictment and the remaining counts were dismissed. BROOKLIER and SCIORTINO were sentenced to prison terms and have, in fact, served their sentences.

On February 20, 1979, BROOKLIER and SCIORTINO, and three others, were named in a five count indictment, which included a substantive RICO count. Count Two of said indictment alleged seven acts of racketeering activity, including the same Farkas extortion which BROOKLIER and SCIORTINO were previously convicted of conspiring to commit by their plea of guilty on April 9, 1975. On March 19, 1979, petitioners filed a motion to dismiss Count Two as violative of the 1975 plea agreement and the Double Jeopardy Clause of the Fifth Amendment. Following the filing of the government's response and oral argument, the Honorable Harry Pregerson denied the petitioners' motion on October 18, 1979. On October 26, 1979, petitioners, pursuant to Title 28, United States Code, Section 1291, and the authority of *Abney v. United States*, 431 U.S. 651 (1977), filed an interlocutory appeal from the denial of their motion.

On March 18, 1980, prior to the date set for oral argument before the Ninth Circuit, the indictment underlying Count Two of the indictment was dismissed without prejudice due to grand jury irregularities. Thereafter, on April 21, 1980, the interlocutory appeal then pending before the Ninth Circuit (No. 79-1680) was remanded to the District Court and subsequently dismissed.

Petitioners were reindicted May 15, 1980, with the indictment reading exactly as the indictment previously dismissed. On June 17, 1980, petitioners filed their motion to

dismiss Count Two of the indictment on Double Jeopardy and breach of plea bargain grounds. The District Court denied petitioners' motion on June 30, 1980.

On July 9, 1980, petitioners filed their interlocutory notice of appeal in response to the June 30, 1980, denial of their Double Jeopardy dismissal motion relating to Count Two of the indictment before the District Court. On August 1, 1980, the government filed its "Motion to Expedite Oral Argument Date and Ruling", inasmuch as the trial on the merits of this matter was scheduled to commence on September 16, 1980. On August 21, 1980, the Ninth Circuit Court of Appeals granted the government's motion and set forth an expedited briefing schedule.

On September 8, 1980, the United States Court of Appeals for the Ninth Circuit issued its order in Case No. 80-1455, affirming the judgment of the District Court. A copy of said order is set forth in the Appendix hereto.

On September 22, 1980, petitioners filed their Petition for Rehearing and Suggestion for Rehearing En Banc with the United States Court of Appeals for the Ninth Circuit.

On September 25, 1980, the petition for rehearing was denied by the Ninth Circuit and the mandate was issued. On October 16, 1980, a Ninth Circuit panel voted to reject the Suggestion for a Rehearing En Banc.

Trial on the underlying indictment commenced on September 30, 1980. On November 14, 1980, verdicts were returned. Both petitioners BROOKLIER and SCIORTINO were convicted on Count Two of the indictment which alleged the Farkas extortion as an act of racketeering. Petitioners were acquitted of Count Three of the indictment (extortion of Theodore Gaswirth in violation of 18 USC 1951) and Count Five of the indictment (obstruction of justice stemming from the killing of Frank Bompensiero in

violation of 18 U.S.C. 1510). On January 20, 1981, petitioner BROOKLIER was sentenced to serve four years on Counts One and Two, with said sentences to run concurrently. On January 20, 1981, petitioner SCIORTINO was sentenced to serve a four year term of imprisonment as a result of his conviction on Count Two.

On January 23, 1981, the Ninth Circuit filed its written opinion regarding the Double Jeopardy issue raised by petitioners' interlocutory appeal. A copy of the opinion is contained in the Appendix hereto and is reported at 637 F.2d 620 (9th Cir. 1980). BROOKLIER and SCIORTINO thereafter filed a Petition for Writ of Certiorari raising the Double Jeopardy issue. Said petition was assigned Supreme Court Docket No. 80-921. The Solicitor General filed a "Memorandum for the United States in Opposition" and argued that review of petitioners' Double Jeopardy claim at that time would be inappropriate. The Solicitor General argued as follows:

> "4. Review of petitioners' double-jeopardy claim would be inappropriate at this stage. The instant petition arises from the denial of a pretrial motion to dismiss Count II of the 1979 indictment, not from a final judgment of conviction. Although the district court's order denying the motion to dismiss was immediately appealable because petitioners invoked the protection of the Double Jeopardy Clause 'against being twice put to *trial* for the same offense' (*Abney v. United States, supra*, 431 U.S. at 661), that rationale is no longer applicable in this case. Since the time their *Abney* appeal was filed and resolved against them by the court of appeals, petitioners have been tried, convicted, and sentenced. Accordingly, the *Abney* analysis allowing a pretrial appeal in order to avoid a second trial is inapposite here.

> In its present posture, this case involves the question whether the Double Jeopardy Clause protects petitioners from being punished—not tried—on Count II of the 1979 indictment. As the Court recognized in *Abney v. United States, supra*, 431 U.S. at 660, this aspect of the protection afforded by the Double Jeopardy Clause 'can be fully vindicated on an appeal following final judgment * * *.' Thus, once the trial has been completed, immediate review under *Abney* should not be available even in the court of appeals, and a fortiori not in this Court. Instead, recourse must be had to the customary appellate process by seeking review of the final judgment of conviction and sentence."
>
> Memorandum for United States in Opposition, page 4.

On March 9, 1981, the United States Supreme Court denied the previous Petition for Writ of Certiorari. See 101 S.Ct. 1514.

Petitioners appealed from their judgments of conviction and raised again their Double Jeopardy claim. On September 3, 1982, the Ninth Circuit Court of Appeals affirmed petitioners' convictions and declined to modify the decision of the interlocutory panel. A copy of the September 3, 1982 opinion is set forth in the Appendix hereto. On November 1, 1982, petitioners' request for rehearing and suggestion for rehearing en banc was denied by the Ninth Circuit Court of Appeals. A copy of the order is set forth in the Appendix hereto.

B. Breach of 1975 Plea Agreement.

Petitioners attacked the inclusion of the Farkas extortion in Count Two as violative of their 1975 Plea Agreement with the federal government. The reporter's transcript of the plea agreement indicates that one of the crucial and negotiated elements relied upon when entering their guilty

pleas was the representation by the prosecutor that BROOKLIER and SCIORTINO would not thereafter be indicted for acts of which the prosecution had knowledge at the time of the pleas. The prosecutor specifically agreed to "clear the decks" in return for petitioners' guilty pleas in 1975.

After the indictment was returned on February 20, 1979, which indictment revived the Farkas extortion, petitioners moved to have the Farkas charged dimissed.

The District Court held a hearing on this matter from which the following was concluded:

(1) The Court made the factual finding that Brooklier and Sciortino reasonably thought the Farkas matter had been concluded by their 1975 plea agreement;

(2) The prosecutor conceded that it was reasonable for Brooklier and Sciortino to believe that the Farkas matter was concluded by their 1975 plea agreement;

(3) The prosecutor who entered into the 1975 plea arrangement with Brooklier and Sciortino did not inform them that Farkas could be revived if later crimes were allegedly committed;

(4) The prosecutor conceded that the plea agreement would have precluded the government from prosecuting Brooklier and Sciortino for the substantive extortion of Farkas;

(5) The Court made the factual finding that, at the very least, the plea arrangement contemplated that the government would not prosecute Brooklier and Sciortino for any action the government had knowledge of at the time the agreement was entered into.

Despite these conclusions, the District Court, without explanation or written opinion, denied defendants' motion to dismiss the indictment on the basis of the violation of the plea agreement.

In its opinion, the Ninth Circuit held that the findings of a district court on the meaning of a plea agreement are reviewable under the "clearly erroneous" standard, citing *United States v. Krasn*, 614 F.2d 1229, 1233 (9th Cir. 1980). Without so much as one word of discussion regarding the unrefuted conclusions as set forth above, the Ninth Circuit panel opted for the all-inclusive determination that the record had been examined and the Court was of the opinion that the District Court's interpretation of the plea agreement is reasonable and not clearly erroneous.

It should be noted that it appears the inclusion of the Farkas extortion as an act of racketeering may have been essential to the prosecution being able to convict petitioners. Count Two charged a substantive violation of the RICO statute. By process of elimination based on the acquittals and government concession of insufficiency, it is evident that the jurors may have relied upon the Farkas extortion and the Sturman attempted extortion in order to find the *two* acts of racketeering required by the statute. 18 U.S.C. 1961(5).[1]

C. Insufficiency of Evidence With Regard to Farkas Extortion.

Counts One and Two set forth, among the racketeering activity relied upon by the prosecution, the extortions of Forex Company, an FBI undercover sting operation. At the Ninth Circuit level, petitioners argued and the government conceded that there was insufficient evidence to link peti-

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[1]The acts of racketeering alleged in Count Two consisted of the Frank Bompensiero murder, the Forex extortion, the attempted extortion of Reuben Sturman, the attempted extortion of Theodore Gaswirth, and the Farkas extortion. Petitioners were found not guilty of the separate and substantive charges relating to the Bompensiero murder and the Gaswirth extortion. The prosecutor has conceded insufficiency of evidence with regard to the Forex extortion as applied to petitioners.

tioners to the Forex extortions. At the conclusion of the prosecution's case, petitioners moved for partial judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(a) with regard to the Forex allegations contained in Counts One and Two. In effect, petitioners asked the Court to delete from the jury's consideration the Forex acts of racketeering insofar as they related to petitioners. The prosecution opposed petitioners' motion. The trial court denied petitioners' motion and, at a later point, stated that there was enough evidence to go to the jury with regard to the Forex charges as they related to petitioners. During closing argument, however, the prosecutor argued to the jury that petitioners were not involved in the Forex extortions, and that the Forex extortions should not be considered by them in determining their guilt or innocence regarding Counts One and Two. The issue presented to the Ninth Circuit Court of Appeals was whether the prosecutor's concession during closing argument to the jury guaranteed that petitioners were not convicted on Counts One and Two on the basis of the Forex charges in view of the fact that the Court charged the jury to consider the Forex allegations when deciding petitioners' guilt or innocence.

The Ninth Circuit, in its decision, holds that any error in allowing the insufficient Forex charges to go to the jury along with the other racketeering counts was harmless beyond a reasonable doubt. It was harmless, the panel held, because the prosecutor argued to the jury that petitioners were not involved in the Forex extortions and that the Forex extortions should not be considered in determining their guilt or innocence.

The question presented by this petition is whether or not the prosecutor's concession regarding Forex during closing argument is sufficient to assure this Court that the jury did not rely upon the Forex allegations to convict BROOKLIER

on Counts One and Two and SCIORTINO on Count Two in view of the fact that the trial court charged the jury to consider such evidence and charges.

D. Forex Federal Jurisdiction.

Petitioners hereby incorporate by reference the statement of the case and all arguments regarding the issue of whether federal jurisdiction under the Hobbs Act exists as set forth in the previously-filed Petition for Writ of Certiorari of co-defendant and co-appellant Jack Lo Cicero, Supreme Court Docket No. 82-5824.

REASON FOR GRANTING THE WRIT.

I.

THE COURT OF APPEALS ERRED WHEN IT DETERMINED THAT THE DOUBLE JEOPARDY CLAUSE WAS NOT VIOLATED BECAUSE IT FAILED TO RECOGNIZE THAT ADDITIONAL PROTECTION BEYOND BLOCKBURGER EXISTS IN THIS SUCCESSIVE PROSECUTION SITUATION.

The Farkas extortion should be considered the "same offense" for purposes of this Court invoking Double Jeopardy protection.

The primary deficiency of the Circuit Court's analysis lies in its failure to recognize that Double Jeopardy protection exists beyond that enunciated by this Court in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), in successive prosecution situations.[2]

A. The United States Supreme Court Has Stated That Additional Protection Beyond Blockburger Does Exist in Successive Prosecution Situations.

The instant case involves a successive prosecution. It has been stated that the Double Jeopardy Clause serves three primary purposes. First, it protects against a second prosecution for the same offense after an acquittal. Second, it protects against a second prosecution for the same offense after a conviction. Third, it protects against multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 23 L.Ed.2d 656, 89 S.Ct. 2072 (1969); *Brown v. Ohio*, 432 U.S. 161, 165, 53 L.Ed.2d 187, 97 S.Ct. 2221 (1977). The scope of each of these protections turns upon the meaning of the words "same offense". Indeed, this Court has indicated that the meaning of this phrase

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[2]The prosecution has always conceded that the 1974 Farkas extortion is factually the same extortion charged in the 1980 indictment.

may vary from context to context, so that two charges considered the same offense so as to preclude prosecution on one charged after an acquittal or conviction on the other need not be considered the same offense so as to bar separate punishments for each charge at a single proceeding. See *Brown v. Ohio, supra*, at 166, 167, n. 6, 53 L.Ed.2d 187, 97 S.Ct. 2221.

The Circuit Court ended its Double Jeopardy inquiry after application of the *Blockburger* test, which has primary significance in multiple charge, single prosecution settings. *Brown v. Ohio, supra*, at 166-167, n. 6, 53 L.Ed.2d 187, 97 S.Ct. 2221. While the *Blockburger* test is a valid starting point for analysis in successive prosecution situations, Petitioners contend that this Court has made it clear that inquiry must not end there.[3]

The Supreme Court has recognized that ". . . separate statutory crimes need not be identical—either in constituent elements or in actual proof—in order to be the same within the meaning of the constitutional prohibition." *Brown v. Ohio*, 432 U.S. 161, 164, 53 L.Ed.2d 187, 97 S.Ct. 2221

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[3]*Brown v. Ohio, supra*, at 166-167, n. 6, 53 L.Ed.2d 187, 97 S.Ct. 2221. While *Brown* found the *Blockburger* test determinative in a successive prosecution situation [crime of theft of automobile barred after conviction of lesser included offense of joyriding], the Court made it clear that Double Jeopardy protection beyond *Blockburger* exists in a successive prosecution situation. The Court stated that its failure to analyze *Brown* in light of this additional protection was a result of its lesser/greater included offense finding, not because Ashe-Nielsen protection did not exist. Cf., *United States v. Snell*, 592 F.2d 1083 (1979). Petitioners suggest the present case is a factual variant of *Snell*. In *Snell*, the successive prosecution took place immediately after remand by the Ninth Circuit and, therefore, did not constitute repetitive harassment. *Snell, supra* at 1085. In the present case, the Farkas extortion took place in 1973, petitioners were indicted in 1974, convicted by plea in 1975 and served their prison sentences in 1975 and 1976. The most recent indictment alleging the Farkas extortion was not returned until May 15, 1980. Unlike *Snell*, repetitive harassment exists in the case at bar.

(1977).[4] The fact, therefore, that the two statutes in question rest on different theoretical bases and could have been charged in separate counts of a single indictment is not dispositive of the issue. Where successive prosecutions are at stake, the guarantee serves ". . . a constitutional policy of finality for the defendant's benefit." *Brown, supra,* at 165, 53 L.Ed.2d 187, 97 S.Ct. 2221 (1977), quoting *United States v. Jorn,* 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1970).

B. Petitioners Should Have Been Protected From the Recent Successive Prosecution Based on Ashe-Nielsen Double Jeopardy Protection.

Various factors argue for a determination that the present successive Farkas allegation should be viewed as the same offense so as to give meaning to the constitutional policy of finality.

Retrying petitioners for the Farkas extortion required the relitigation of factual issues resolved in the 1974 case. The factual basis for the plea in the 1974 case indicates that the

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[4]It is clear that the Supreme Court has given Double Jeopardy protection against successive prosecutions where an application of the *Blockburger* rule of statutory construction would not have. *In re Nielsen,* 131 U.S. 176, 9 S.Ct. 673, 33 L.Ed. 118 (1889); *Ashe v. Swenson,* 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). In commenting on these cases, the *Brown* court noted that the *Blockburger* test is not the only standard for determining whether successive prosecutions impermissively involve the same offense. Even if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first. *Brown, supra,* at 166 and 167, n. 6, 97 S.Ct. 2221, 53 L.Ed.2d 187. Moreover, Justice Rehnquist, in his dissent in *Whalen, supra,* 63 L.Ed.2d 715, 100 S.Ct. ...., has suggested that the *Blockburger* test, although useful in identifying statutes that define greater and lesser included offenses in the traditional sense, is less satisfactory, and perhaps even misdirected, when applied to statutes defining "compound" and "predicate" offenses, a situation the Supreme Court has not as yet faced in a Double Jeopardy context.

Farkas extortion was completed. During the taking of the guilty plea, government counsel stated:

> ". . . At the direction of Mr. DeRosa and on occasion Mr. Milano, Sam Farkas was shaken down and he paid in excess of $10,000.00 directly to Mr. Milano . . ."

This is significant because it is clear that the recent successive prosecution of petitioners regarding Farkas required the relitigation of factual issues already resolved by the first in contravention of *Nielsen. Brown, supra*, at 166 and 167, n. 6, 97 S.Ct. 2221, 53 L.Ed.2d 187.[5]

Petitioners' position that the instant successive prosecution should be barred is supported by the only statement in

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[5]Looking beyond the statutory language in successive prosecution situations for purposes of assessing and invoking Double Jeopardy protection is well accepted. In *Nielsen*, the Court held that "where . . . a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy." *Nielsen, supra*, at 188, 9 S.Ct. 673, 33 L.Ed. 118. In *Whalen, supra*, 63 L.Ed.2d 715, defendant was convicted in the same proceeding of rape and first degree murder for killing the victim while perpetrating the rape. The government's position was that the offenses should not be considered the same for Double Jeopardy purposes so as to prevent cumulative sentencing. The government argued that the felony murder and rape are not the same offense since felony murder does not in all cases require proof of rape. The Court refused, however, to view this question in the abstract and found that in the facts of that particular case proof of rape was a necessary element of proof of the felony murder. Further, in *Sanabria v. United States*, 98 S.Ct. 2170, 2179 (1978), the Court when deciding a Double Jeopardy claim noted: "The precise manner in which an indictment is drawn cannot be ignored because an important function of the indictment is to ensure that, 'in case any other proceedings are taken against [the defendant] of a similar offense, . . . the record [will] show with accuracy to what extent he may plead a former acquittal or conviction.' *Cochran v. United States*, 157 U.S. 286, 290, 15 S.Ct. 628, 630, 31 L.Ed. 704 (1895)." *Sanabria, supra*, at 2179.

the legislative history of the RICO statute dealing with previously litigated crimes.[6]

> "Here, the prosecution, *absent any prior conviction*, would have to prove beyond a reasonable doubt two illegal acts in order to establish the 'pattern'." 116 Cong. Rec. 35208
>
> (Remarks of Rep. William F. Ryan, October 5, 1970). (Emphasis added.)

If one were to acccept the Circuit Court's analysis that in this successive prosecution situation the only issue to resolve is a recognition of the conspiracy/substantive dichotomy, the day following petitioners' plea in the 1974 case the government could have successively indicted them for a substantive RICO violation, alleging the precise same acts of racketeering as set forth in the conspiratorial RICO to which they pleaded. This preposterous scenario is not dealt with by the Court in its opinion, but is, nevertheless, no different than what the government did by the inclusion of the Farkas extortion in Count Two of the present case.

II.

THE PETITIONERS' 1975 PLEA AGREEMENT WITH THE GOVERNMENT WAS VIOLATED UNDER SANTOBELLO v. NEW YORK.

The District Court made a factual determination that, at a minimum, the 1975 plea agreement meant that BROOKLIER and SCIORTINO could not be substantively prose-

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[6]It is, perhaps, noteworthy at this point to mention that both Justices Brennan and Marshall, in their concurring opinions in *Brown, supra*, at 170, 53 L.Ed.2d 187, 97 S.Ct. 2221, appear to have taken a position which would ban the 1980 Farkas extortion prosecution because Farkas was not substantively prosecuted as one proceeding with the conspiratorial RICO in 1974. The same is true of their concurring opinion in *Harris v. Oklahoma*, 433 U.S. 682, 53 L.Ed.2d 1054, 97 S.Ct. 2912 (1977), and their dissent from the denial of the petition for writ of certiorari in *Rivera v. Ohio*, Supreme Court Docket No. 82-5109.

cuted for any action the government had knowledge of at the time the agreement was entered into. Further, the Court made a factual determination that it was reasonable for BROOKLIER and SCIORTINO to believe that their 1975 plea agreement with the government ended the Farkas matter for all purposes. This point was also conceded by the government prosecutor. It was further conceded by the government prosecutor and recognized by the Court that at no point did the government inform the petitioners that the Farkas matter could be revived for purposes of a successive prosecution. Given the factual determinations and concessions by the prosecutor, as set forth hereinabove, the District Court, nevertheless, denied petitioners' motion to dismiss Count Two. The Ninth Circuit held that the findings of the District Court were not clearly erroneous.

A. The District Court's Determination That the Plea Agreement Was Not Breached Was Clearly Erroneous.

A plea bargain itself is contractual in nature and subject to contract law standards. *United States v. Arnett*, 628 F.2d 1162 (9th Cir. 1979); *United States v. Krasn*, 614 F.2d 1229 (9th Cir. 1980). Any dispute over the terms of the agreement is to be resolved by objective standards.

The essential question is what the parties to the plea bargain reasonably understood to be the terms of the agreement. *United States v. Arnett, supra*, at 1164; *United States v. Crusco*, 536 F.2d 21, 23, 27 (3d Cir. 1976). Petitioners maintain that, given the District Court's determination that petitioners reasonably believed, based on what had been represented by the prosecutor on the record, that the Farkas matter was at an end, and it follows that the District Court should have determined that a plea bargain agreement had been breached.

The fundamental teaching in this area comes from *Santobello v. New York*, 404 U.S. 257 (1971).

> "When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." 404 U.S., at 262.

The Supreme Court noted that the petitioner, in *Santobello*, had "bargained" for the particular plea, and that there must be "specific performance of the agreement". 404 U.S., at 262, 263.

The prosecutor's view is that, while the plea agreement would have precluded the government from successively prosecuting petitioners for the substantive Farkas extortion "in and of itself", the government was, nevertheless, free to include it as an act of racketeering in a subsequent substantive prosecution. This is a distinction without merit. First, it must be noted that the prosecutor conceded that nowhere in the transcript of the plea agreement was this set forth. Second, to construe the language of the plea agreement in that fashion makes no sense. For example, according to the prosecutor's theory, the government would have been free to include the Farkas extortion as well as another act of racketeering that was included in Count One of the 1974 indictment (to which the petitioners pled guilty) in Count Two of the present indictment, as long as the government included other acts of racketeering in Count Two which took place after the April 9, 1975 plea. The jury could then return a guilty verdict based solely on two acts of racketeering which were purportedly resolved by the 1975 plea agreement, a result even the prosecution has conceded would be improper.[7]

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[7]In fact, it may be that something like this did occur since Farkas may have been essential to the finding of guilt on Count Two. See Footnote 1, supra.

In the instant case, the petitioners objectively relied on the prosecutor's promise. They went to jail; BROOKLIER for twenty months and SCIORTINO for sixteen. Further, both agreed to waive the right to seek parole and both served the maximum amount of time available under the sentences that were meted out. As a result, the District Court should have commanded specific enforcement of the prosecutor's unfulfilled promise and dismissed the Farkas act of racketeering from Count Two.

III.

THE PROSECUTOR'S CLOSING ARGUMENT CONCEDING PETITIONERS WERE NOT INVOLVED IN THE FOREX EXTORTIONS REQUIRED REVERSAL OF COUNTS ONE AND TWO ON THE BASIS OF INSUFFICIENCY OF EVIDENCE.

Counts One and Two set forth, among the racketeering activity relied upon by the prosecution, the extortions of Forex Company, an FBI undercover sting operation. At the conclusion of the prosecution's case, the petitioners moved for a partial judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(a) with regard to the Forex allegations contained in Counts One and Two. In effect, the petitioners asked the Court to delete from the jury's consideration the Forex acts of racketeering insofar as they related to them. The prosecution opposed petitioners' motion. The Court denied petitioners' motion and, at a later point, stated that there was enough evidence to go to the jury with regard to the Forex charges as they related to petitioners. During closing argument, however, the prosecutor argued to the jury that BROOKLIER and SCIORTINO were not involved in the Forex extortions, and that the Forex extortions should not be considered by them in determining their guilt or innocence regarding Counts One and Two.

The Ninth Circuit held that the error in allowing the insufficient Forex charges to go to the jury along with the other racketeering counts was harmless beyond a reasonable doubt. It was harmless, the panel held, because the prosecutor told the jury that BROOKLIER and SCIORTINO were not involved in the Forex extortions and that the Forex extortions should not be considered in determining their guilt or innocence.

The question presented here is whether or not the prosecutor's concession regarding Forex during closing argument was sufficient to assure that the jury did not rely upon the Forex allegations to convict Brooklier on Counts One and Two and Sciortino on Count Two in view of the fact that the District Court charged the jury to consider such evidence and charges.

This issue necessarily raises considerations as to the nature and function of closing argument. It should be noted that, in taking the position that the error was harmless beyond a reasonable doubt, the Ninth Circuit cited no authority. Consistent with applicable law, the jury was instructed that statements and arguments of counsel are not evidence in the case. (See Devitt and Blackmar, *Federal Jury Practice and Instructions*, Section 11.11.) The jury, then, was legally bound to consider the Forex extortions as racketeering activity charged in Counts One and Two. Had the District Court granted Brooklier and Sciortino's partial Rule 29 motion as to Forex and had the jury been instructed to disregard Forex when considering the guilt or innocence of Brooklier and Sciortino on Counts One and Two, it would not be necessary to speculate as to whether the jury felt itself bound by the prosecutor's argument.

A judgment for acquittal pursuant to Rule 29 is an important safeguard to a defendant. It tests the sufficiency of the evidence against him, and avoids the risk that a jury

may capriciously find him guilty though there is no legal sufficient evidence for his guilt. In this case, the jury was instructed that it could consider the Forex extortions in deciding the guilt or innocence of Brooklier and Sciortino on Counts One and Two. Given that the Court instructions require the jury to consider such evidence, it cannot be legitimately argued that solely because the prosecutor told the jury that petitioners were not involved in Forex that the jury did not, nevertheless, consider Forex and use those extortions as acts of racketeering against Brooklier and Sciortino. (Apparently, the jurors did not consider themselves totally bound by the prosecutor's closing argument since it acquitted Brooklier and Sciortino of a number of counts despite the prosecutor's pleas that they should not do so.)

At a minimum, it is difficult to conceive of how the Ninth Circuit could take a position that such error was harmless beyond a reasonable doubt. Courts do not find error harmless when the evidence affects a crucial element of the case. *United States v. Miller*, 603 F.2d 109 (9th Cir. 1979). The inflammatory nature of the case is all the more reason to believe that the jury may have considered the Forex extortions in resolving the guilt or innocence of Brooklier or Sciortino on Counts One and Two.

Federal Rule of Criminal Procedure 30 requires that the Court, *not the prosecutor*, charge the jury. In *United States v. Hutchinson*, 338 F.2d 991 (4th Cir. 1964), it was determined to be error when the judge failed to charge the jury but, rather, relied upon the arguments of counsel. The Court held:

> "The trial court cannot adopt by reference the exposition of the law *as argued to the jury by counsel* and escape its duty to instruct under Rule 30 of the Rules

of Criminal Procedure." *United States v. Hutchinson*, at 991. (Emphasis added.)

Further, in *Taylor v. Kentucky*, 436 U.S. 478, 98 S.Ct. 193, 56 L.Ed.2d 468 (1978) the United States Supreme Court, citing *United States v. Nelson*, 498 F.2d 1247 (5th Cir. 1974), stated that ". . . arguments of counsel cannot substitute for instructions by the Court." *Taylor v. Kentucky*, at 489-490. Yet, that is precisely what happened here. The trial court instructed the jury to consider the Forex charges as to the petitioners. The prosecutor told them not to. The Circuit, without more, finds "beyond a reasonable doubt" that the jury followed the prosecutor's argument and not the Court's instructions. To allow this holding to stand shocks the conscience.

IV.

FEDERAL JURISDICTION UNDER THE HOBBS ACT DOES NOT EXIST WHERE THERE IS NO ACTUAL OR POTENTIAL EFFECT ON INTERSTATE COMMERCE.

Petitioners hereby incorporate by reference the statement of the case and all arguments regarding the issue of whether federal jurisdiction under the Hobbs Act exists as set forth in the previously-filed Petition for Writ of Certiorari of co-defendant and co-appellant Jack Lo Cicero, Supreme Court Docket No. 82-5824.

CONCLUSION.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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